

Loss of Wage-Earning Capacity (LWEC)

Monique Madrid & Mary Ellen Flores - September 25, 2024

Objectives



Upon completion of this lesson the learner will be able to:

- Identify the different types of loss of wage-earning capacity (LWEC) decisions
- Describe the vocational rehabilitation (VR) program
- Determine when an LWEC decision can be modified
- Develop a plan of action to reduce chargebacks
- Understand ICPA's role in the LWEC Process



LWEC / WEC / Shadrick Formula



5 U.S.C. §8106(a)

 Injured workers (IW) who can perform some work, even though it is not the full duty version of their date of injury (DOI) job, are considered partially disabled. If a partially disabled IW returns to work (RTW) earning less than the current pay rate of their DOI job grade and step, the Office of Workers' Compensation Programs (OWCP) may pay the difference. This is called an LWEC determination.



LWEC / WEC / Shadrick Formula



5 U.S.C. §8106(a) (Cont.)

 The objective of an LWEC is to estimate an IW's earning capacity as close as possible to parity with current pay for the grade and step held on DOI. There are no provisions to compensate the IW's grade or step increases they might have received had they not been injured. The mathematical determination of an IW's wage-earning capacity (WEC) is made using the Shadrick formula.



Shadrick Formula



- The Shadrick formula is used to compare the current actual earnings with the current pay rate for the DOI position (the formula considers cost-of-living increases for the DOI job). A percentage is calculated, and IW's loss of WEC is then determined and used in formal LWEC decisions and/or informal LWEC situations.
- The Shadrick formula is composed essentially of three pay elements:

Established pay rate when disability began, recurrence or DOI (periodic roll compensation is based on)
 Current DOI pay rate (what the DOI grade and step is making at the same date as of current position)
 Pay rate for current position worked or could be worked by IW



When CE reaches out to Injury Compensation Program Administrator (ICPA) regarding current DOI pay rate, "current" may be any date as long as actual or constructed weekly earnings are computed as of the same effective date. If unsure you are providing the right pay information, please reach out to your MA to discuss prior to sending requested information in writing to CE.



Shadrick Formula (ICPA Action)



The key role of the ICPA is to provide information to OWCP to assist with the elements of the Shadrick formula. The following information may be requested to properly calculate the LWEC:

- Pay rate and work schedule on date of disability, recurrence and/or DOI which include identification and breakdown of any premiums pays earned at DOI.
- Current salary of DOI job.

ΤΙΡ

- Pay rate for current position worked by IW.
- Provide a written response within 30 days of receipt of request.
 - Ensure pay rate sent is verified by payroll. Reach out to MA with issues.

ICPA should ensure a form SF-50 and DOI position description is in case file.

WEC



When the disability from work is partial, OWCP provides for a reduction in compensation to reflect the IW's WEC. Job positions that are identified need to be fair and reasonable. The following will help determine if it is:

- the nature of injury;
- the degree of physical impairment;
- IW's usual employment;
- age;
- qualifications for other employment;
- the availability of suitable employment; and
- other factors or circumstances which may affect WEC in their disabled condition.



5 U.S.C. §8115

Check Your Knowledge



What information is needed from the ICPA for the Claims Examiner (CE) to compute the Shadrick formula?

- a) Provide the salary information effective the date of the pay rate being used on the periodic roll (PR)
- b) Current salary of DOI job
- a) Provide requested pay rate information in writing to CE within 30 days
- b) All the above



Answer



d) All the above





Types of LWECs

Actual LWEC (AE WEC)

Based on IW's **actual earnings** in limited duty position they are working

Constructed LWEC (CWEC)

Based on estimated earnings in an identified (capable) limited duty position IW **could work**

Zero LWEC

Based on IW's actual earnings in limited duty position they are working that is **equal or greater** in pay to the position at DOI **or full duty** RTW

Informal LWEC

Based on IW's actual earnings in limited duty position they are working with **no written** (formal) job offer

AE WEC



- If the IW becomes gainfully employed while in receipt of PR payments PR compensation benefits are reduced immediately upon RTW **based upon the actual earnings** in the new position. After working 60 days, CE will issue an AE WEC decision.
- Agency must have a written position description outlining the duties and physical requirements (classified position) that conforms to IW's established physical limitations.
 - The IW's salary, after placement in a lower-paying position, may be used as a basis for LWEC determination if it fairly and reasonably represents the IW's earning capacity. The IW receives compensation based on the difference between the pre-injury and post-injury wages.



Time spent solely in a training program prior to starting job position is not counted toward the 60 days.



20 C.F.R. § 10.520

AE WEC Example



Ms. Woodhouse was employed as a Commissary Store Clerk for the Dept of Navy making \$20 per hour. On 10/23/2013, a box fell on her. She underwent two back surgeries and a right shoulder arthroscopy.

She was temporarily totally disabled (TTD) for 2 years and was released to full-time, light duty restrictions. Thereafter, her claim was referred to VR services where a Rehabilitation Counselor (RC) went through the process of assisting Ms. Woodhouse in finding gainful employment.

Ms. Woodhouse accepted a job offer as a Stockroom Associate in the private sector making \$10 per hour. After 60 days in the new position, the CE issued an AE WEC decision reducing her compensation based on the results from the Shadrick formula.



Constructed LWEC (CWEC)



During the placement phase of VR, if the IW does **not** become gainfully employed after a 90-day job search and RC confirms that the identified positions in the VR plan are reasonably available in IW's commuting area (or, in some cases, the area where IW resided when injured) the following will occur:

 The RC is required, if possible, to provide relevant (written) information in final VR report for two (or more) available and appropriate jobs, including salary and an explanation of how any specific vocational preparation requirements were met. The RC or Rehabilitation Specialist (RS) should use available nonprivate sources, including the state employment services, to provide this information to CE.



Constructed LWEC (CWEC)



- Based on this information, the CE determines whether these jobs are suitable to form the basis of a CWEC determination.
- CE will issue a proposed reduction based upon one of the selected positions RC identified. After 30 days due process, a final CWEC decision is rendered, and compensation is adjusted based upon the constructed earnings.



CWEC Example



Mr. Smith sustained a work-related knee injury while employed as an Aircraft Mechanic for the U.S. Marine Corps. He underwent total knee arthroplasty and was TTD for 1.5 years. He was released to work with restrictions and was referred out for VR services. He was subsequently released to work with restrictions, and as he was medically separated from the UCMC after 1 full year of TTD, OWCP referred him for VR services aimed at private sector reemployment.

The RC identified the following job positions, Customer Service Representative and Stockroom Associate, using labor market surveys (LMS), in which Mr. Smith is capable of working. The CE uses this information and issues a proposed and later a final CWEC decision based on the earnings Mr. Smith would have earned had he secured employment.



Zero LWEC



- If the IW secures gainful employment earning an equal or greater salary compared to the current salary of IW's DOI job, there is no loss of wages. Once the IW works 60 days in the new position a Zero LWEC decision is issued.
- This could be based on RTW with DOI agency or through outside employment (usually from efforts through VR).
- Zero LWEC is also considered to be an AE WEC because it based on actual wages.



A Zero LWEC decision is not needed if an IW returns to work full duty. Only when limitations are involved, which prevent them from working the DOI position.





- If the IW accepts a temporary job without signing an official job offer, an informal LWEC can be made based on the actual earnings of the temporary position. CE reduces PR based on actual earnings.
- Since there is **no signed formal job offer**, a formal LWEC decision cannot be issued, and the IW is paid on an informal LWEC.



When placing IW back to work with agency, it is best to do job offer whether temporary or permanent to ensure that OWCP is aware (in writing) of the duties and wages IW should make. Without it could lead to confusion for CE on how the IW should be paid on an LWEC (causing possible over/underpayment) and/or inability to settle discrepancies between agency and IW over inability of IW to do certain job duties. CA-3 (Report to Work Status Form) is not a substitute for written job offers.

Check Your Knowledge



TRUE or FALSE:

If after 90 days of placement services, the IW is employed for at least 60 days in the new position and the earnings do reasonably represent the IW's work capacity, compensation benefits will be reduced based on the actual earnings of the job held by the IW.



Answer



TRUE







OWCP upon referral from CE, will assign a RC to utilize their professional skills to assist IW with returning to suitable employment with either their DOI employer or within the private sector (meaning new employer). **Participation in program by the IW is mandatory**.

Criteria:

- IW must be on the PR.
- Agency has not made a job offer or is not able to accommodate restrictions.
- Restrictions are current, stable, and well-defined (at maximum medical improvement).
 - \circ Released to at least 4 hours minimum of work
 - $\circ~$ Released to at least sedentary work (lift/carry/push/pull up to 10 lbs.
 - occasionally). Occasionally means no more than 2 hours and 40 minutes in an 8-hour workday)

VR (Previous/DOI Employer)

TIP



- RC will reach out to DOI agency first to assist with placement if the case file has no indication that a job offer is in place or written notice that they could not accommodate IW's work limitations.
- Informal analysis of IW's life skills (i.e., previous jobs, military, education, volunteer work, etc.) known as transferrable skills is completed and findings are used to determine possible placement in another position.
- RC will be in direct contact with ICPA for involvement in the job search, evaluation of location and equipment for potential placement, and RTW tracking for the first 60 days to ensure IW is capable of working position.

Ensure ICPA's (or agency representative) contact information is up-to-date in IW's case file in ECOMP so the RC can reach out to the correct person in a timely manner regarding job placement.

VR (New Employer)



- RC will assist with services (i.e., vocational testing, resume building) aimed at obtaining work within the private sector or a different federal agency.
- Efforts will be made to identify at least two vocationally appropriate targeted positions through current labor market surveys (LMS) and the Dictionary of Occupational Titles (DOT) suitable to the work limitations and formal transferrable skills (i.e., degree, certification).
- RC will determine if IW is eligible for formal training (i.e., computer training, GED) and provided needed materials (i.e., laptop, software, textbooks) to be qualified for positions available in IW's commuting area.



VR (New Employer)



RC will help IW search for jobs during the 90-day placement period once it has been determined IW is qualified for positions in commuting area (more days can be granted with permission for extension).



If IW starts employment outside your agency without going through VR process let your MA know and reach out to CE so they can determine if a task-based referral to VR is needed regarding new employment.



VR (Assisted Reemployment)



- Assisted Reemployment is a temporary wage subsidy incentive intended to increase job offers for IWs whose disability makes them difficult to place (i.e., IW has completed training in a field which has become highly competitive due to area economic conditions).
- This is only offered to private sector, state, or local government agencies.



VR (Assisted Reemployment)



(Cont.)

- The wage subsidy plus LWEC shall not exceed the amount of compensation for total disability (meaning 75% or 66 2/3% rate).
- It is up to 3 years partial salary reimbursement to employers. Breakdown as follows:
 - $\circ~$ First year is at 75% rate
 - $\circ~$ Second year is at 50% rate
 - $\,\circ\,$ Last year is at 25% rate
- Subsidy is not transferrable from one employer to another.



VR (Non-Cooperation)



- Non-cooperation during any phase of VR could result in the application of a sanction under 5 U.S.C. § 8113(b).
 - IW who receives a suspension of compensation must show efforts of cooperation in VR program to end such suspension.
 - Review RC reports and notify (in writing) CE if you see non-compliance documented.



VR (Non-Cooperation)



(Cont.)

EARLY STAGE OF VR:

Suspension of compensation to zero based on the assumption (with no evidence to the contrary) that efforts in program would have resulted in a no LWEC for RTW.

NOTE

LATER STAGES WHEN JOB POSITIONS IDENTIFIED:

Reduction of compensation occurs based on the amount likely to represent IW's WEC from job positions identified by RC as suitable (which is a CWEC).

Please note that OWCP is not a retirement program and "filing" for retirement is not an excuse for lack of participation in VR. The IW is considered truly retired once election has been made and are officially collecting OPM retirement. Notify CE once this occurs.

VR (LWEC Decisions)



The end goal of VR is to determine what an IW is capable of working so the CE can issue a formal LWEC decision and adjust compensation.

New Employer:

- When IW is vocationally capable of performing the selected positions but was not successful in securing employment in field that is available in their commuting area the CE will select a position that will be used for CWEC.
- If IW is able to obtain employment the CE will determine AE WEC based on the actual earnings that fairly and reasonably represented IW's earning capacity.



VR (LWEC Decisions)



Previous (DOI) Employer:

• When IW accepts job offer from their DOI agency at a lower pay or equal or greater pay to their DOI (full duty) position pay, the CE will issue an AE WEC.

	Previous (DOI) Employer	New Employer
AE WEC	Х	Х
CWEC		Х



Check Your Knowledge



TRUE OR FALSE:

RC's will use informal transferrable skills along with suitable work limitations to identify at least two vocational appropriate targeted job positions for IW.



Answer



FALSE.

RCs will use **formal** transferrable skills along with suitable work limitations to identify at least two vocational appropriate job positions for IW.

RCs will identify vocational positions when locating employment for IW with a new employer.



LWEC Modification



When a formal LWEC decision (including Zero LWEC) is in place, there are **only three allowable reasons** for it ever to be modified. The burden of proof to establish one of these reasons rests with the party seeking modification.

Criteria for LWEC modification:

(1) Material change of accepted conditions

Based on current well-rationalized medical that demonstrates:

- A worsening with no intervening injury causing increased disability
- Improvement causing decreased disability



LWEC Modification



(2) IW was vocationally rehabilitated

- Working new position (different from rated position) for 60 days
- Retrained through vocational training (i.e., orientation training) or self-rehabilitated (i.e., going to college and obtaining a degree without VR assistance)
- Earn at least 25% more than current pay of rated position

(3) Original formal LWEC decision was done in error



LWEC Modification (Other Circumstances to Consider)



If an IW with a prior formal LWEC rating, accepts a position with **no wage loss** and RTW, no employment-related disability or wage-loss entitlement continues. The CE should terminate compensation on the basis that there is no disability within the meaning of the Act even though an LWEC is in place.



LWEC Modification (ICPA Actions)



- If ICPA finds a job that will put the IW at no wage loss, please provide job offer to them and to OWCP and notify CE of the RTW via form CA-3.
 Consult MA with any questions or concerns.
- If ICPA sees on form CA-1032 new employment different from already established LWEC decision, consult with MA to see if modification of LWEC is necessary.



LWEC Modification (ICPA Actions)



(Cont.)

- If ICPA notices any errors in a formal LWEC decision reach out to MA to review findings together. Once reviewed, put findings in writing and advise OWCP by letter. Specifically, request for modification of LWEC based on error.
 - $\circ~$ Note the date of specific LWEC decision issued that is in error
 - List all errors noted and provide as much explanation and evidence to support findings
 - Explain what would be correct and/or provide evidence to show
 - the correct information (i.e., SF-50)



36



Check Your Knowledge



ICPA Charlene notices while reviewing a case file that the IW's formal AE WEC decision from 2017 was calculated incorrectly which appears to have caused overpayment on the WEC periodic rolls (PW) from 2017 to present. What should Charlene do first to try to resolve this issue?

A) Let the IW know immediately that they must pay back accruing overpayment.

B) Call CE and request that they modify LWEC decision.

C) Reach out to MA to review what was discovered and provide documentation that supports discovery.



D) None of the above.

Answer



C.) Reach out to MA to review what was discovered and provide documentation that supports discovery.



LWEC CB Effects



The chargeback (CB) system is the mechanism by which, OWCP assigns the costs of compensation for work-related injuries and deaths to the agency. A CB report is generated at the end of every fiscal accounting period.

PR Cases: By establishing an LWEC on a PR case, it would result in a decrease in CB costs. With an LWEC in place, the IW's full TTD compensation would stop, and IW will only get paid for the difference entitled by RTW (based on Shadrick formula).



LWEC CB Effects



PW Cases: If CE modifies an LWEC decision in place, it could cause the pay to the IW to change in the following ways:

- Reducing the current LWEC payments (based on LWEC decision in file) to a lower LWEC payment (based on new position and the now modified LWEC)
- Place the IW back into TTD (PR status) pay based on the worsening of accepted condition(s) which will increase CB
- Terminate compensation (and reduce CB) based on the medical condition/disability resolving

MC Cases: There may be a worsening of accepted condition that may cause a Zero LWEC decision to be modified to PR cases which will increase CB.



CB Effects (ICPA Actions)



- CB lists should be reviewed quarterly to detect any errors or changes as soon as possible.
- Always do form CA-3 when there is a RTW (or a work stoppage) and generate a job offer in writing whether temporary or permanent. Ensure RTW date is verified.



CB Effects (ICPA Actions)



- Check with your Command about policy and process for job offers and placement for IW. Ensure they know how to incorporate the help of field nurses (FN) and RC's when made available. If there is no policy or process in place, work with your Command and MA to create a streamlined process.
 - $\circ\,$ Should include risk assessments for bringing IW back to work.



CB Effects (ICPA Actions)



- Look at the medical in file to see if injury has resolved or restrictions have been established/lifted/changed.
- If IW is on the PR for total disability but the CA-1032 has information about them working, please advise MA and CE.
- Provide accurate pay rate information on CA-7s and when CE reaches out for pay rate information. Providing pay rate information in a timely manner to OWCP ensures IW is paid correctly, creates less over/underpayments.



Check Your Knowledge



TRUE OR FALSE:

By establishing an LWEC on a PR case, it would result in a decrease in CB costs.



Answer



TRUE.

Unlike total disability wage loss compensation (PR), LWEC compensation (PW) is calculated by OWCP using the Shadrick formula giving consideration to an IW's work capacity and actual or constructed earnings. The IW's actual or constructed earnings result in a lower 28-day PW compensation payment, when compared to the total disability PR compensation payment, which will in turn decrease the agency's CB costs.



Take Away Tips



- Placement with new employer is the phase of VR during which an IW is provided services aimed at obtaining work with a different employer, other than the original agency.
- Application of sanctions for non-cooperation of VR under 5 U.S.C.
 8113(b) will result in suspension of compensation unless and until the IW demonstrates cooperation with VR efforts.
- There are four types of LWEC decisions: AE WEC, CWEC, Zero LWEC, and Informal LWEC.



Take Away Tips



- Make sure to provide the CE with salary information. This is critical because a WEC cannot be calculated and issued without this information.
- CB lists should be reviewed quarterly to detect any errors or changes as soon as possible.







FECA Procedure Manual (Part 8), Vocational Rehabilitation: https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT8

FECA Procedure Manual Section 8-0800, Assisted Reemployment: https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT8#80800

FECA Procedure Manual (Chapter 2-0813), Vocational Rehabilitation Services:

https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT2/group3#20813







FECA Procedure Manual (Chapter 2-0815), Determining Wage-Earning Capacity Based on Actual Earnings:

https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT2/group3#20815

FECA Procedure Manual (Chapter 2-0816), Determining Wage-Earning Capacity Based on a Constructed Position https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT2/group3#20816

5 U.S. Code § 8115 - Determination of wage-earning capacity: https://www.law.cornell.edu/uscode/text/5/8115



Additional References



FECA Procedure Manual (Chapter 2-1501), Modification of Loss of Wage-Earning Capacity Decisions

https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT2/group3#21501

FECA VR Power Point:

https://www.dol.gov/sites/dolgov/files/owcp/dfec/icstraining/vocationalrehabilitation/voc ationalrehabilitation.pdf

5 USC § 8104: Vocational Rehabilitation:

https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim title5section8104&num=0&edition=prelim



Additional References



5 U.S.C. § 8113 - U.S. Code - Unannotated Title 5. Government Organization and Employees § 8113. Increase or decrease of basic compensation:

https://www.law.cornell.edu/uscode/text/5/8113

20 C.F.R. § 10.519, part C, What action will OWCP take if an employee refuses to undergo VR?:

https://www.ecfr.gov/current/title-20/chapter-I/subchapter-B/part-10/subp F/subject-group-ECFR796340ac6736884/section-10.519





Questions?



Please take a moment to provide us your feedback

You can scan the QR code or go to: https://forms.osi.apps.mil/r/DJCJgsuUwP Injury Compensation Single Topic and Study Session Assessment



